

1 UNITED STATES DISTRICT COURT
 2 EASTERN DISTRICT OF NEW YORK

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21-CR-483(ENV)

3 UNITED STATES OF AMERICA,

4 Plaintiff,

United States Courthouse
 Brooklyn, New York

5 -against-

November 22, 2022
 1:00 p.m.

6 CHRIS BANTIS,

7 Defendant.

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9 TRANSCRIPT OF CRIMINAL CAUSE FOR TRIAL
 10 BEFORE THE HONORABLE ERIC N. VITALIANO
 11 UNITED STATES SENIOR DISTRICT JUDGE
 BEFORE A JURY

12 APPEARANCES

13 For the Government: UNITED STATES ATTORNEY'S OFFICE
 Eastern District of New York
 14 271 Cadman Plaza East
 Brooklyn, New York 11201
 15 BY: LINDSEY OKEN, ESQ.
 TARA BRIGIT McGRATH, ESQ.
 16 JENNIFER M. SASSO, ESQ.
 Assistant United States Attorneys

17 For the Defendant: FEDERAL DEFENDERS OF NEW YORK
 18 One Pierrepont Plaza
 Brooklyn, New York 11201
 19 BY: NORA K. HIROZAWA, ESQ.
 MARISSA SHERMAN, ESQ.

20 Also Present: EMILY MOOSHER, PARALEGAL
 21 CAROLINE KISSICK, PARALEGAL
 PAUL TAMBRINO, AGENT

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25 Proceedings recorded by mechanical stenography. Transcript
 produced by computer-aided transcription.

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1 (In open court; Jury not present.)

2 (Defendant enters the courtroom.)

3 THE COURTROOM DEPUTY: Next case on calendar is
4 U.S.A. versus Chris Bantis. Case Number 21-CR-483 on for a
5 jury trial.

6 Would the attorneys please note their appearances,
7 beginning with government counsel.

8 MS. OKEN: Good afternoon, Your Honor. Lindsey
9 Oken, Tara McGrath and Jennifer Sasso on behalf of the United
10 States. We are joined by paralegal specialist Emily Moosher,
11 and FBI Special Agent Paul Tambrino.

12 THE COURT: Good afternoon to all at the government
13 table.

14 MS. HIROZAWA: Good afternoon, Your Honor. Nora
15 Hirozawa and Marissa Sherman, Federal Defenders, on behalf of
16 Chris Bantis, who is present with us at counsel table, along
17 with our paralegal Caroline Kissick.

18 THE COURT: And good afternoon to all at the defense
19 table as well.

20 THE COURTROOM DEPUTY: Counsel for both sides are
21 present, including the defendant.

22 THE COURT: All right, ladies and gentlemen, the
23 jury came back this morning, went to work as we had planned
24 yesterday. Apparently they are more relaxed and refreshed.
25 They seem to be busy and provided us with a couple of notes

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1 that the clerk will mark and read.

2 THE COURTROOM DEPUTY: Court's Exhibit 7. Supplies.
3 Request more cups, tape, snack follow up from William. Thank
4 you.

5 Court's Exhibit 8. Request from jury.

6 One, NYPD arresting officer's testimony.

7 Two, entire transcript from Jessie's testimony.

8 Three, question for judge. On September 9th, 2021,
9 what was Chris Bantis arrested for?

10 (Court Exhibits 7 and 8, was received in evidence.)

11 THE COURT: Do I take the last one first?

12 I don't think there's any evidence in the record of
13 the actual arrest.

14 MS. OKEN: That's, for the most part, correct, Your
15 Honor, and I think we would propose an instruction sort of to
16 that effect.

17 I think we can sort of quickly dispose of items 1 or
18 2 by telling them the parties are in the process of agreeing
19 upon transcripts to be sent back.

20 With respect to that third question, I think we
21 would propose something along the lines of what Your Honor
22 just said, which is, you know, to the extent there is evidence
23 in the record, they are entitled to review that.

24 And I think some of the testimony that they have
25 requested, including the testimony requested in the instant

1 note, does in some ways speak to the circumstances surrounding
2 the arrest.

3 But obviously to the extent that they are seeking
4 information that is not in the record at this trial, we would
5 ask that the Court instruct the jury that they're not to
6 speculate as to information that is outside the scope of the
7 record.

8 THE COURT: Ms. Hirozawa.

9 MS. SHERMAN: Judge, it's Marissa Sherman. Hi.

10 The first part of what Ms. Oken just said I think we
11 agree with, which is that whatever testimony and evidence is
12 in the record regarding the arrest, they are free to look at
13 and review.

14 And I think that if they sent a note then back
15 saying we'd like all the evidence about the arrest, they
16 actually have that in the request for these two transcripts.

17 The second part about not to speculate. My only
18 concern with using the word "speculate" when we are talking
19 about what he was arrested for, is that that could then cause
20 them to actually speculate that he was arrested for something
21 that has nothing to do with this case. And so we would just
22 ask that the instruction be capped at kind of the first part
23 of what Ms. Oken said.

24 THE COURT: Is it that it's -- does anyone disagree
25 with the statement that there is no direct evidence of the

1 formal arrest in the record?

2 MS. OKEN: I think, Your Honor, that is -- I guess
3 the answer that I would give is that it sort of depends on
4 what exactly the jury's getting at with their question.

5 If they want to know, you know, what charge the NYPD
6 officers listed, that's correct, I don't think there is any
7 direct evidence of that.

8 If they are looking more for the circumstances, you
9 know, what events led up to it, things like that, there is
10 some information in the record about the 9-1-1 call in advance
11 of the arrest, things of that nature. So I suppose it depends
12 on exactly what evidence they are looking for.

13 I don't know that we are wedded to the particular
14 language that I referenced earlier about the speculating, and
15 I think, you know, I think we are fine with an instruction
16 that essentially alerts them that they are limited to the
17 evidence in the record, most of which they have already
18 received.

19 THE COURT: I'm just doing my own speculating.

20 I assume that the issue is that an NYPD officer made
21 an arrest, and most likely the charge that they are now
22 considering isn't what he put on the card, which is probably
23 true.

24 MS. SHERMAN: Correct.

25 THE COURT: He would have no reason to even know

1 that there was a federal issue here.

2 MS. SHERMAN: I believe that in the paperwork that
3 was provided to the NYPD that the charge that Mr. Bantis was
4 arrested for was a misdemeanor menacing charge. And then the
5 FBI took over before he was actually even formally charged in
6 state court.

7 So that's correct, there's no evidence in the record
8 of the actual arrest charge, which was a state misdemeanor
9 menacing charge.

10 THE COURT: I think that's probably what they were
11 driving at.

12 MS. SHERMAN: Agree.

13 MS. OKEN: We agree with that as well. And I think
14 it sounds like we're all on the same page that they are sort
15 of limited to what's in the record. I have no issue with the
16 Court advising them to that effect.

17 THE COURT: Advising them that they are limited to
18 what's in the record.

19 And you all want me to tell them that there is
20 nothing in the record before they go crazy as to exactly what
21 the police officer may have written?

22 MS. OKEN: I think perhaps given that they have
23 already requested testimony that sort of speaks to the
24 circumstances, we could do sort of the inverse of that, which
25 is to advise them that some of the testimony that they have

1 already requested does speak to some of the circumstances
2 surrounding the arrest.

3 THE COURT: All right.

4 The officer that testified, was he actually the
5 arresting officer?

6 MS. SHERMAN: No, which is why we did not elicit
7 that.

8 THE COURT: I thought that was the case, that he was
9 not the arresting officer.

10 MS. OKEN: He was present that day, and as Your
11 Honor recalls, he gave some testimony about some of the events
12 that day, but is not the arresting officer.

13 THE COURT: So Perez was the arresting officer?

14 MS. HIROZAWA: I believe Gatto was the arresting
15 officer technically on the paperwork, Your Honor.

16 There were about maybe ten officers, maybe six
17 officers present that day. We received body-camera footage
18 for probably closer to a dozen officers between 9/8 and 9/9.

19 MS. SHERMAN: Okay. We have to come up with a --
20 what are we -- when do you anticipate having the transcript,
21 Ms. Oken? There are going starting on their lunch break soon.

22 MS. OKEN: I think probably within the next ten to
23 15 minutes. We've sent the defense proposed redactions with
24 respect to one of the two witnesses. We still are reviewing
25 testimony from the second, but we expect to send it over

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1 within the next, you know, five minutes, as soon as we go off
2 the record. So I think the parties will probably be in
3 agreement within the next ten to 15 minutes after we go off
4 the record here.

5 THE COURT: All right, so I will not detain you.
6 What I will do is let you finish that, then call me back,
7 William, and we'll come back and make sure we don't have any
8 squabbles on the transcript. And when it's ready to go into
9 the jury, we'll bring them in and answer the question and give
10 them the transcript.

11 MS. OKEN: Thank you, Your Honor.

12 THE COURT: Okay. And in the meantime William I
13 guess has provided them food.

14 MS. OKEN: And thank you, William.

15 THE COURT: We're on a roll, so we'll see you in
16 about, if Ms. Oken's guess is good, we'll see you in about 15
17 minutes.

18 MS. OKEN: Thank you, Your Honor.

19 (A recess was taken at 1:21 p.m.)

20 (Defendant enters the courtroom.)

21 THE COURTROOM DEPUTY: All rise.

22 Court is back in session. Counsel for both sides
23 are present, including the defendant.

24 THE COURT: All right, I understand that counsel
25 have agreed on the transcripts and they're ready to be

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1 delivered.

2 MS. OKEN: That is correct, Your Honor. We are
3 awaiting receipt of the hard copies, which should be here from
4 across the street any second now.

5 THE COURT: Okay, so what we'll do is we'll bring
6 the jury in and answer their last question. And if it's
7 miraculous that the transcripts are actually here at that
8 moment, we'll send them back with the transcripts; if not,
9 we'll tell them that they'll momentarily arrive.

10 MS. OKEN: Thank you, Your Honor.

11 (Pause in the proceedings.)

12 MS. HIROZAWA: Your Honor, can we just briefly
13 clarify exactly how the Court plans to phrase the response to
14 the jury's question?

15 THE COURT: That last question? I'm just going to
16 tell them facts for them to find in the evidence.

17 MS. HIROZAWA: Understood, Your Honor. Thank you.

18 (Pause in the proceedings.)

19 (Jury enters the courtroom.)

20 THE COURT: Be seated, please.

21 Counsel will stipulate that the jury is present and
22 properly seated.

23 MS. OKEN: We do, Your Honor.

24 MS. HIROZAWA: So stipulated.

25 THE COURT: Thank you, counsel.

1 Ladies and gentlemen, good afternoon. I know you're
2 enjoying your lunch at the moment. We're not going to keep
3 you too long. We wanted to let you know that we received your
4 note.

5 Counsel and the Court have been working on the
6 transcript and we have now agreed on a transcript, which
7 should arrive here momentarily, and we will provide that to
8 you and the witnesses that you requested in your last note.

9 Your last note also had a question for me about a
10 fact, which is the arrest of the defendant. But it's a fact.
11 And the fact department is your department. During your
12 deliberations, I don't add to the facts, I don't characterize
13 the facts, I don't catalog the facts.

14 So as that fact, like any other fact, you have the
15 evidence before you. You're free to look at it. If you need
16 to make requests in connection with it to provide you with
17 additional pieces of evidence, like a transcript, we will
18 endeavor to provide that and give you the opportunity to
19 review it and hopefully find the information that you need.
20 All right?

21 So that's -- we will send you back to continue your
22 deliberations and also to continue your lunch. And as soon as
23 the transcripts arrive, we will provide that directly to you
24 through the marshal.

25 And we thank you for your again, attentiveness,

1 promptness, patience, cooperation and your service. We all
2 appreciate it very much. Thank you.

3 (Jury exits the courtroom.)

4 THE COURT: Okay. So we'll see you again. I mean,
5 the plan will continue to be, since we've had nothing to
6 indicate any lack of progress. In fact they seem to come back
7 reinvigorated after their night of relaxation and reflection.

8 So I am mindful of what tomorrow is, the Wednesday
9 before Thanksgiving, and we'll just play it by ear as we go
10 through the afternoon. And hopefully we'll get a more
11 dispositive communication from the jury between now and
12 midnight, or whatever it is we'll be here.

13 MS. SHERMAN: Judge, it's Marissa Sherman. That was
14 actually going to be my question. Do you have -- obviously we
15 don't know what they're going to send, do you have an
16 intention of what time you're intending to keep them 'til
17 tonight?

18 THE COURT: I'm trying to keep them -- it's around
19 3, it certainly wouldn't be any earlier than last night. If
20 they were to give some indication that, you know, we're almost
21 there, then we'll stay.

22 MS. SHERMAN: Okay.

23 THE COURT: I don't know what -- I just assume that
24 the jury's like everybody else on the Wednesday before
25 Thanksgiving, they may have time commitments. People coming

1 and going and actually coming and going themselves to some
2 other places.

3 MS. SHERMAN: Yes, and I just -- Judge Kuo, during
4 jury selection, just so you're aware, did indicate that we
5 would -- if the trial was continuing on Wednesday, that we
6 would only be working until 1.

7 THE COURT: Okay.

8 MS. SHERMAN: So...

9 THE COURT: That's good. And thank you for saying
10 that. I didn't know that.

11 That's fine, so they have some -- so they do have
12 some expectation.

13 MS. SHERMAN: Yes.

14 MS. OKEN: I think that's right, Your Honor. And
15 any jurors that have travel commitments that would preclude
16 them from working on Wednesday were surfaced as well during
17 jury selection.

18 THE COURT: During jury selection, okay, that's
19 fine. So we're relatively, other than defrosting the turkey
20 and the like, okay, I guess. So we'll see.

21 Again, to the extent that we're getting any
22 indication later in the -- and I've that. Juries they say,
23 you know, we're going -- I know we're supposed to go home, can
24 we stay another 40, we think we're blah, blah, and I stay.

25 MS. OKEN: That makes sense, and we're happy to play

1 it by ear.

2 THE COURT: And you're also happy to have lunch. I
3 think they'll probably be occupied. I wouldn't have brought
4 up a five-course meal, but I think now is the time to have
5 your lunch, if you haven't done so already.

6 MS. OKEN: Thank you, Your Honor.

7 THE COURT: Stay in touch.

8 (A recess was taken at 2:08 p.m.)

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1 A F T E R N O O N S E S S I O N

2 (Time noted: 3:40 p.m.)

3 (In open court; Jury not present.)

4 (Defendant enters the courtroom.)

5 THE COURTROOM DEPUTY: All rise.

6 Court is back in session. Counsel for both sides
7 are present, including the defendant.

8 THE COURT: All right. Welcome back. As you know,
9 we have a note. The clerk will mark it.

10 (Court Exhibit 9, was received in evidence.)

11 THE COURTROOM DEPUTY: This is Court's Exhibit 9.
12 Question from the jury and update.

13 Judge, we have continued to deliberate and still
14 cannot reach a unanimous verdict. We have also reviewed the
15 final jury charge extensively. Please advise on the
16 recommended next steps. Thank you.

17 THE COURT: So I will borrow the jury's question and
18 ask counsel for their advice.

19 MS. OKEN: Thank you, Your Honor. Lindsey Oken on
20 behalf of the government.

21 I think Your Honor had indicated on the record
22 yesterday that should we sort of arrive at this juncture, the
23 Court was inclined to deliver the *Allen* charge from *Sand*.

24 I think the government certainly has no objection,
25 and we do agree that at this juncture some form of an *Allen*

1 charge is appropriate.

2 I think, in an effort to supplement that charge and
3 to sort of avoid giving them a charge that very closely
4 mirrors charges that they've already received, we have sort of
5 three proposals that either individually or in combination we
6 think are worth considering to see if that might prompt some
7 movement.

8 The first is to add some language that is adopted
9 from a case out of the Second Circuit and that was recently
10 blessed by Judge Ross in a recent case that essentially
11 expounds on the policy reasons for delivering an *Allen* charge
12 and informs the jury that there is no reason to believe that
13 this case would be tried either differently or more
14 exhaustively in the future or that a hypothetical future jury
15 would be better equipped or could more intelligently arrive at
16 a verdict.

17 And so it sort of helps to supplement the *Allen*
18 charge in terms of giving the jury an explanation for why it
19 is so important that they continue to deliberate. And we're
20 happy to sort of propose some specific language to that effect
21 for the Court's consideration.

22 The second proposal that I think we briefly raised
23 on the record yesterday is to provide some additional clarity
24 with respect to the verdict sheet. And, again, we're happy to
25 provide some proposed language in terms of what we mean

1 specifically by that, but I think the essence of it would be
2 that if the jury has reached a unanimous decision as to one or
3 more of the lines set out in the verdict sheet, they can
4 inform the Court of that. They can check the guilty box and
5 inform the Court of that. Alternatively, or conversely, if
6 they have unanimously determined that none of the boxes should
7 be checked, they can check not guilty and inform the Court of
8 that.

9 And, again, we're happy to provide some specific
10 language to that effect.

11 And then the third is a little bit less substantive,
12 but to the extent the Court advises the jury that continuing
13 their deliberations into tomorrow morning is a possibility, we
14 wonder if that might affect how they use their remaining time
15 this afternoon.

16 So those are sort of three possibilities again that
17 either individually or in combination might help to prompt
18 some movement and give them some new information that they
19 have not yet heard.

20 MS. HIROZAWA: Your Honor, unsurprisingly, perhaps,
21 we disagree with the government with regard to those
22 suggestions.

23 First, we move again for a mistrial. I do think
24 that at this point, following the Court's last instruction
25 yesterday as of 5:30 p.m., the jury returned to the jury room,

1 deliberated for another hour, returned this morning, began
2 deliberating at about 10 a.m. The jury's now been
3 deliberating for over two days, almost two and a half days, on
4 a case that took about four and a half days to try.

5 Based on the questions we've received from the jury,
6 there have been substantive questions, requests for testimony,
7 which have been provided. Requests for video playback. And
8 it's clear, I think, that this jury is trying to meaningfully
9 work together, but they simply have been unable to arrive at a
10 unanimous decision, notwithstanding those efforts.

11 I would note that in none of the notes to the Court
12 has the jury indicated that he have any confusion about the
13 verdict form. The Court did instruct the jury that the
14 verdict form is self-explanatory, but if they had any
15 questions about it, to notify the Court.

16 And so I don't see any reason to provide further
17 instruction regarding the verdict form, given that there's
18 been no question about the verdict form. We're aware that
19 this jury is quite capable of asking questions about the
20 questions they have.

21 And additionally they have stated that they are
22 unable to arrive at a unanimous decision, and so I think the
23 government's concern that they may have agreed at something
24 unanimously but simply don't know what box to check, is just
25 not grounded in the notes that we have received, in particular

1 Court Exhibit 9.

2 Additionally, Your Honor, I think we believe that it
3 would be at this point, given that the jury has deliberated
4 for almost another full day since the last instruction, to --
5 about the duty to deliberate, we believe that it would be
6 coercive to issue an *Allen* charge at this juncture when they
7 have clearly taken that last instruction seriously and made
8 diligent efforts to arrive at a decision.

9 And instruct -- in issuing an *Allen* charge at this
10 point we believe would force them -- would cause them to
11 believe that it is impermissible not to arrive at a decision.

12 And we believe that it would be coercive to discuss
13 deliberating until Thanksgiving to create -- to quote/unquote
14 create some movement. I think the type of movement that
15 Ms. Oken's referring to is exactly the type of coercion that
16 we do not want in the jury room.

17 And so, Your Honor, that would be our request, first
18 the motion for a mistrial and then we're happy to address with
19 further specificity any other questions the Court may have.

20 THE COURT: Do you want any brief reply, Ms. Oken?

21 MS. OKEN: I'm happy to very briefly reply to the
22 mistrial application, as well as the suggestion of coercion
23 here.

24 With respect to a mistrial application, I think the
25 Court is well aware of the length of time this jury has been

1 deliberating, which is not exceeding long. They had a full
2 day yesterday, albeit with a late start, and I think had less
3 than two hours the prior week.

4 So I don't think we're at the juncture quite yet
5 where we should be giving serious consideration to a mistrial
6 application, particularly in light of the fact that they have
7 not been delivered an *Allen* charge quite yet.

8 With respect to the suggestion of coercion, we think
9 that coupled with the Court's standard *Allen* charge, this
10 language would not cause any coercion, because the jury would
11 be reminded about maintaining any firmly-held views while
12 simultaneously being open to engaging in conversation and
13 reevaluating their views, in light of compelling arguments
14 regarding the evidence. So we think the sum total of the
15 Court's instruction would not at all give a suggestion of
16 coercion.

17 And then finally, I'll briefly address the verdict
18 sheet.

19 The jury certainly has not in their notes expressed
20 any confusion about the verdict sheet. But I will note that
21 the verdict sheet is not explicit to the effect of these being
22 alternative bases for reaching a verdict. And what I mean by
23 that is, it doesn't use language like if this or this or this
24 or this, and I think as the Court is aware, there was an
25 additional check line added just before this verdict sheet was

1 finalized, which I think may have caused some heightened
2 confusion as to how many boxes and where they need to be
3 checked.

4 So I think some additional clarity could be helpful
5 in terms of advising them that if they have reached unanimity
6 as to one or more, they can alert the Court of that and keep
7 the instruction balanced. We could similarly advise them that
8 if they have reached unanimity as to checking none of them,
9 they could similarly advise the Court of that.

10 THE COURT: All right, I find myself closer to the
11 defense position than the government has issued here.

12 The verdict sheet has to be read in conjunction with
13 the charge, and I am convinced that they have done exactly
14 that.

15 I read their notes to suggest that at this point
16 that they are deadlocked. They have not reached a decision
17 unanimously about anything that would -- on any categories so
18 that they haven't reached the unanimous decision of between
19 guilt and innocence and not guilty because they haven't
20 reached the unanimous position that any one of the tick-box
21 items applies. So that they're -- I'm sure some for guilt and
22 some for not guilty on each one of those tick marks.

23 When you analyze how long the trial lasted, you have
24 to parse out the colloquies, the openings, the closings, the
25 instructions to the jury, and basically it is pretty close now

1 that they have actually been in the deliberating room
2 deliberating about as long as the evidence production part of
3 the trial lasted.

4 So that any further instruction would really have to
5 be along the lines of the deliberation, the instructions we
6 gave yesterday, which was really a reread of the deliberations
7 instructions and the final charge.

8 And when you read to commentary to *Sand* in
9 particular, the Second Circuit commentary, that the language
10 about the majority should do this and the minority should do
11 that and the other, is disfavored and particularly in this
12 context. I think that the Circuit would find it disfavored.

13 The balance of the charge is -- again, it may be a
14 slight step up from what we, I guess, a reformulation,
15 essentially, of what we read -- of what we read to them
16 yesterday, their duty to more collaboratively in the end not
17 to give up any consciously-held position just for the sake of
18 reaching a final decision.

19 So I see it as almost a lost cause but trying not to
20 make it a lost cause. We've come up with a version of the
21 *Allen* charge as it is set forth in *Sand*, minus the minority
22 language, and I'll ask Scott, it's not that long, to read it
23 now and seek positions of counsel on it.

24 Scott?

25 THE LAW CLERK: As I told you in my original

1 instructions, this case is an important one to the government.
2 It is equally important to the defendant. It is desirable if
3 a verdict can be reached, but your verdict must reflect the
4 conscientious judgment of each juror, and under no
5 circumstance must any juror yield his conscientious judgment.

6 It is normal for jurors to have differences; this is
7 quite common. Frequently, jurors, after extended discussions,
8 may find that a point of view that originally represented a
9 fair and considered judgment might as well yield upon the
10 basis of argument and upon the facts and the evidence.
11 However, and I emphasize this, no juror must vote for any
12 verdict unless after full discussion a consideration of the
13 issues and exchange of views, it does represent his or her
14 considered judgment.

15 Further consideration may indicate that a change in
16 original attitude is fully justified on the law and all of the
17 facts. I do want to read to you a statement that is contained
18 in a Supreme Court opinion that is well known to the bench and
19 the bar, and it is this:

20 That although a verdict must be the verdict of each
21 individual juror and not mere acquiescence in the conclusion
22 of his fellows, yet they should examine the questions
23 submitted with candor and with a proper regard and deference
24 to the opinions of each other; that is what their duty to
25 decide the case if they could consciously do so.

1 You are reminded also that the prosecution bears the
2 burden of proving each element of the offense beyond a
3 reasonable doubt. Do not ever change your mind just because
4 the other jurors see things differently, or just to get the
5 case over with. As I told you before, in the end, your oath
6 must be exactly that - your vote. As important as it is for
7 to you reach unanimous agreement, it is just as important that
8 you do so honestly and in good conscience. What I have just
9 said is not meant to rush or pressure you into agreeing on a
10 verdict. Take as much time as you need to discuss this.
11 There is no hurry.

12 THE COURT: As I said, it's really an embellishment
13 on what we read them yesterday. It may have an affect. I
14 think, given the tea leaves here, that this is a truly
15 deadlocked jury in the sense that some have a different view
16 of the facts. Not a confusion about the law, not a confusion
17 about the verdict sheet, it is a disagreement as to whether or
18 not certain facts happened and or the happening of those facts
19 made up with the law that they received the final instruction.

20 MS. OKEN: Understood, Your Honor. With respect to
21 that proposed language, I don't think we have any objections
22 to it but if Your Honor wouldn't mind, I will read the two
23 sentences that was adopted from language that was blessed by
24 Judge Ross and adopted from a Second Circuit case, which
25 essentially provides:

1 There does not appear to be any reason to believe
2 that the case can be tried again better or more exhaustively
3 than it has been on either side. So there appears to be no
4 reason to believe if the case were to be submitted to another
5 jury that jury would be more intelligent, more impartial, or
6 more competent to decide it then you are.

7 And so we think that might sort of provide some
8 additional color. We understand that this is a charge that
9 the Court -- the one that the Court read is one that has been
10 reviewed by the Court already, and we have no objection to it
11 but wanted to propose this for some additional language for
12 the Court's consideration.

13 MS. HIROZAWA: Your Honor, we would object to that
14 language, specifically based on the events that have
15 transpired up until this point and the notes that we've
16 received.

17 I think that type of charge might be appropriate in
18 a case where a jury has responded with deadlock I think with
19 succession or whether some question about the jury carefully
20 considering the evidence before them.

21 But here I don't think that's the case and I do
22 think that language would be coercive under the circumstances
23 or a case like a mistrial.

24 THE COURT: I'm not going to add it, and as I say,
25 my view is more akin to the defense side.

1 The jury's, I think, told us just the opposite.
2 That they've worked very hard. That they have scoured the
3 evidence and there's just a disagreement when they, among
4 them, as I say, either attracts themselves and/or how those
5 facts that they agree on relate to the law that we gave them.

6 This is just an encouragement for them to make a
7 final last effort to the listen to each other, and perhaps
8 somebody -- and it has to be somebody in the room, not
9 somebody out here, persuades them to a different view. We
10 don't know if they're 11 and 1. We don't know if they're 6
11 and 6.

12 MS. HIROZAWA: And, Your Honor, on that note, I
13 think the Court's perception based on the notes is likely
14 accurate.

15 We would request that the Court include the First
16 Circuit addition in this *Sand* instruction, which simply states
17 in the last paragraph: But if you cannot agree, it is your
18 right to fail to agree, or some other indication that it is
19 permissible for them to not reach an agreement and that's just
20 to curb any potential --

21 THE COURT: I think that is plain as day in the last
22 sentence, as Scott read it. It doesn't need any further
23 embellishment.

24 Okay, let's bring them in. Scott will read them the
25 charge, and we'll go from there.

1 (Jury enters the courtroom.)

2 THE COURT: Be seated, please.

3 Counsel will stipulate that the jury is present and
4 properly seated.

5 MS. OKEN: Yes, Your Honor.

6 MS. HIROZAWA: So stipulated.

7 THE COURT: Thank you, counsel.

8 Ladies and gentlemen, welcome back to the courtroom.

9 We do have your note and, again, we all very much appreciate
10 your continued service and your patience and your
11 attentiveness to the job.

12 It is not unusual for jurors to have disagreement.
13 That's why deliberations generally last as long as they do and
14 hence sometimes we will get a note of the kind that you sent
15 to all of us, which said that you are deadlocked and now what,
16 essentially.

17 And the pattern jury instructions do have a charge,
18 an instruction for jurors who basically send notes like that
19 to the Court, and we are going to -- and hopefully it will be
20 of help to all of you.

21 I'm going to ask Scott Woods to read that charge to
22 you now and then we're going to send you back to the jury room
23 for further deliberations.

24 Scott.

25 THE LAW CLERK: As I told you in my original

1 instructions, this case is an important one to the government.
2 It is equally important to the defendant. It is desirable if
3 a verdict can be reached, but your verdict must reflect the
4 conscientious judgment of each juror, and under no
5 circumstance must any juror yield his conscientious judgment.

6 It is normal for jurors to have differences; this is
7 quite common. Frequently, jurors, after extended discussions,
8 may find that a point of view that originally represented a
9 fair and considered judgment might well yield upon the basis
10 of argument and upon the facts and the evidence. However, and
11 I emphasize this, no juror must vote for any verdict unless
12 after full discussion and consideration of the issues in
13 exchange of views, it does represent his or her considered
14 judgment.

15 Further consideration may indicate that a change in
16 original attitude is fully justified on the law and all of the
17 facts. I do want to read to you a statement that is contained
18 in a Supreme Court opinion that is well known to the bench and
19 bar, and it is this:

20 That although a verdict must be a verdict of each
21 individual juror and not a mere acquiescence in the conclusion
22 of his fellows, yet they should examine the question submitted
23 with candor and with the proper regard and deference to the
24 opinions of each other; that is with their duty to decide the
25 case if could conscientiously do so.

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1 You are reminded also that the prosecution bears the
2 burden of proving each element of the offense beyond a
3 reasonable doubt.

4 Do not ever change your mind just because the other
5 jurors see things differently, or just to get the case over
6 with. As I told you before, in the end, your vote must be
7 exactly that - your vote. As important as it is for you to
8 reach unanimous agreement, it is just as important that you do
9 so honestly and in good conscience. What I have just said is
10 not meant to rush or pressure you into agreeing on a verdict.
11 Take as much time as you need to discuss this. There is no
12 hurry.

13 THE COURT: All right, ladies and gentlemen, that's
14 the instruction. We hope that is of value to you. We send
15 you back to the jury room and allow you to continue your
16 discussions.

17 (Jury exits the courtroom.)

18 THE COURT: Any further inquiry of counsel, assuming
19 that there is no verdict, that we have a mistrial, do counsel
20 want to have an opportunity to chat with the jury in the jury
21 room?

22 MS. HIROZAWA: Yes, Your Honor, from the defense.

23 THE COURT: The government, too?

24 MS. OKEN: Yes, Your Honor.

25 THE COURT: Okay, so I'll try to -- we can't keep

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1 them, but I will encourage them to stay, or as many of them
2 who want to stay to stay, it is the Tuesday before
3 Thanksgiving, and hopefully at least some of them will.

4 And, Scott, I'm sure you'll benefit from it as well.

5 All right, so we'll -- hopefully we end up with a
6 verdict, but time will tell.

7 But we'll see you, and what goes around again, if we
8 haven't heard from them, I think we will probably adhere to
9 the -- we're not going to torture them longer than last night,
10 so we'll adhere to it, around 6:15 p.m. we'll pull them back
11 out at around 6:30 p.m., if we have not heard from them.

12 MS. HIROZAWA: Understood. Thank you, Your Honor.

13 MS. OKEN: Thank you, Your Honor.

14 THE COURT: You're welcome.

15 (Pause in the proceedings.)

16 THE COURTROOM DEPUTY: All rise.

17 (Defendant enters the courtroom.)

18 THE COURTROOM DEPUTY: Court is back in session.

19 Counsel for both sides are present, including the
20 defendant.

21 THE COURT: All right, be seated, please.

22 I wish I had a note to report incoming, but we
23 don't. Normally what I -- and it gets a little awkward so I'm
24 going to suggest we do it in writing.

25 I would make at this point an inquiry of the jury if

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1 they needed additional time to deliberate and send them back
2 to the jury room to answer that question so that they can do
3 it collectively rather than having different voices or
4 whatever from the jury box.

5 I propose that we send back a single inquiry and,
6 I'll have Scott read it to you, see what the views of counsel
7 might be.

8 THE LAW CLERK: Status inquiry from the Court.
9 Please reply in writing. Does the jury request the Court to
10 provide additional time for deliberations.

11 MS. OKEN: Your Honor, this is Lindsey Oken for the
12 government.

13 I think given that the Court's last instruction,
14 which was after 4 p.m. today, that informed the jury that
15 there was no hurry, no rush, and that they should take all the
16 time that they need, I think the absence of the communication
17 in the interim is a bit telling, especially from a jury that
18 has been quite active in terms of communication.

19 So I think we would suggest that silence suggests
20 that they are digging back in and that in the absence of any
21 indication that they remain deadlocked, we should assume that
22 they have relied on the Court's representation that there is
23 no hurry and that they are entitled to take as much time as
24 they need.

25 So I think we certainly have no issue with making an

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1 inquiry of the jury, but I think we would propose a slightly
2 tweaked version that sort of inquires whether they would like
3 to continue deliberating into this evening or whether they
4 would like to return tomorrow to continue their deliberation.

5 MS. HIROZAWA: The defense has no objection to the
6 language the Court has proposed.

7 I think in light of the Court's last instruction,
8 which did not include the portion of the instruction that
9 advises them that it is permissible not to arrive at a
10 verdict, I think that this language would be adequate.

11 THE COURT: Yes, I think they may have notes passing
12 in the interim here, but we've sort of set 6:30 as a break
13 point.

14 I interpret their silence that they're waiting, as
15 we did last night, for us to tweak them as opposed to them to
16 tweak us. And I kept it as open as possible. I didn't say
17 when they would get, you know, time before they needed
18 additional time.

19 And the answer is either going to be yes or no.

20 MS. OKEN: Sure.

21 THE COURT: And if the answer were to be yes, it
22 would not be tonight.

23 MS. OKEN: Sure.

24 We understand that. It does make sense to make an
25 inquiry of the jury at this juncture. I think our only

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1 thought what was the nature of that inquiry should be and how
2 should it be phrased in light of the fact that they were given
3 the *Allen* charge proximately two hours ago.

4 THE COURT: I'm always of the view on these
5 instructions that less is more, particularly and including on
6 appeal.

7 MS. OKEN: Sure. And I don't know that we would
8 propose adding more so much as inquiring whether they might --

9 THE COURT: Lindsey, you did ask me to add more.

10 MS. OKEN: I think we would propose a substitute in
11 lieu of a supplement.

12 THE COURT: It comes out the same way.

13 I'm going to have the deputy clerk provide it to the
14 marshal to provide it to the jury.

15 (Pause in the proceedings.)

16 THE COURT: Counsel, to clarify, we're asking them
17 to actually respond on that sheet of paper and so, therefore,
18 we'll mark it as an exhibit when we get their response.

19 MS. HIROZAWA: Thank you, Your Honor, that was our
20 understanding.

21 (Pause in the proceedings.)

22 (Court Exhibit 10, was received in evidence.)

23 THE COURT: We will mark it Court's Exhibit 10 for
24 the record.

25 MS. HIROZAWA: Court's Exhibit 10, response to the

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1 Court's inquiry. Not for today, maybe we convene tomorrow.

2 THE COURT: So there you have it.

3 MS. HIROZAWA: Only maybe?

4 MS. OKEN: Your Honor, we have a group of dedicated
5 jurors on our hands.

6 THE COURT: God bless them.

7 And it is -- I think it's better that we should tell
8 them, remind them today, that since -- indicating that they
9 want us to reconvene, we will indeed schedule a session
10 tomorrow. But as Judge Kuo had indicated, it won't go past 1
11 tomorrow.

12 MS. HIROZAWA: Sounds good, Your Honor.

13 MS. OKEN: Your Honor, do we want to discuss their
14 starting hour in light of the short day tomorrow?

15 THE COURT: There are difficulties for me to get
16 here. So I mean they could come and start without me until --
17 and hold a note until I get here at normal time. That's a
18 possibility.

19 You want them to come in 9:30?

20 MS. OKEN: Your Honor, I think the government's
21 available at 9, 9:30 and have no objection to holding any
22 notes until the Court is available.

23 MS. SHERMAN: I don't think that the defense has an
24 objection. I know a number of our jurors are coming in from
25 Long Island and they've been coming in every day.

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1 THE COURT: They are supposedly coming in at 9:45,
2 and we're trying to get them so that they are here by 10.

3 MS. SHERMAN: We have no objection.

4 MS. HIROZAWA: And we can certainly be available by
5 the time the Court is available.

6 THE COURT: I'm normally here at 9:45 anyway, but
7 sometimes the Staten Island Ferry does not cooperate.
8 Although the weather is supposed to be good tomorrow, but that
9 doesn't necessarily mean anything.

10 Okay. So we'll bring them back and tell them to try
11 to get here between 9:15 and 9:30, and we'll start as close to
12 that time and they're all here.

13 MS. OKEN: Thank you, Your Honor.

14 MS. SHERMAN: You're welcome.

15 MS. HIROZAWA: Thank you, Your Honor.

16 THE COURT: Welcome.

17 (Pause in the proceedings.)

18 (Jury enters the courtroom.)

19 THE COURT: Be seated, please.

20 Counsel will stipulate that the jury is present and
21 properly seated.

22 MS. OKEN: We do, Your Honor.

23 MS. HIROZAWA: So stipulated.

24 THE COURT: Thank you, counsel.

25 Ladies and gentlemen, thank you for advising us on

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1 your desire to further deliberate, but not tonight. We will
2 then indeed reconvene tomorrow.

3 All of us very much admire and appreciate your
4 dedication to serve and understanding how important your
5 service is overall to both sides and to the rule of law. So
6 you've been a model of working hard and deliberating hard, and
7 we all appreciate that.

8 But we will take our break for the night. And as
9 you may recall way, way back when you were before Judge Kuo,
10 the jury selection, she assured everyone that whatever
11 happened in the case that you wouldn't be working on the
12 Wednesday before Thanksgiving past 1 p.m., and we will keep
13 that promise that Judge Kuo made.

14 So you have no concerns, so if you have travel plans
15 to keep or turkeys to stuff or whatever, you'll be out no
16 later than 1. Obviously if you have a verdict in advance of
17 that we're not going to keep you until 1, we'll let you go as
18 soon as you've completed your work.

19 But all of the other admonitions continue to apply.
20 Again, use the overnight hours as a chance to relax and to
21 reflect on the work that you've done today and the work that
22 lies ahead. That reflection is a silent reflection. You're
23 not sharing it with anyone. You're not to discuss the case
24 amongst yourselves or with anyone else.

25 There is what I call the "radio silence rule".

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1 You're not by any form of communication not just walkie-talkie
2 or social media or telephone or whatever, discuss the fact
3 that you are a juror, that you're coming to the courthouse, or
4 anything that even remotely touches upon the case.

5 You're not to use the overnight hours to do some
6 homework. Again, there's no homework in this school.
7 Everything is done in here in the courtroom and in the jury
8 deliberation room.

9 So there's no research, electronic or otherwise,
10 that you can do about anything that remotely touches on the
11 case. And certainly not permitted to visit any of the
12 locations that have been identified in the course of the
13 trial.

14 There is also a concern about media attention to
15 this case, and to the extent, again, using that broader
16 definition of "media", should it pop up, appear on your
17 internet screen or on your TV or radio or in your newspaper,
18 you are to totally disregard it.

19 And I still encourage you to try to tune out,
20 disregard media accounts of any legal proceeding for fear that
21 it will confuse you about what your responsibilities are here.

22 And we know that we're all sensitive to commutation
23 issues, particularly on a, quote, get-away day, unquote, but
24 we're going to ask you to try to come into the courthouse
25 somewhere between 9:15 and 9:30, so we'll try to start a half

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1 hour earlier and build in some additional time for you, and
2 then we will resume deliberations as soon as all 12 of you are
3 here and you're in the deliberation room behind the closed
4 doors and in the custody of the marshal.

5 So, again, we appreciate your time and your service,
6 bid you a pleasant evening, and look forward to being with you
7 tomorrow morning.

8 Have a pleasant night.

9 (Jury exits the courtroom.)

10 THE COURT: Okay, well I guess we'll see everybody
11 tomorrow.

12 MS. OKEN: Thank you, Your Honor.

13 THE COURT: Have a pleasant evening.

14 MS. OKEN: You, too.

15 * * * * *

16 (Proceedings adjourned at 6:55 p.m. to resume on
17 November 23, 2022 at 10:00 a.m.)

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19 * * * * *

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